Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Global NAPs, Inc., for	)	
Preemption of the Jurisdiction of the	)	CC Docket No. 99-15
New Jersey Board of Public Utilities	)	
Pursuant to Section 252(e)(5) of the	)	
Telecommunications Act of 1996	)	
	)	

AMERITECH COMMENTS

The Ameritech Operating Companies (Ameritech) respectfully submit these comments pursuant to the pleading cycle established for this proceeding.

I. INTRODUCTION

Ameritech recognizes the importance of the threshold question presented by the Petition, namely, whether the Commission should preempt the jurisdiction of the New Jersey Board of Public Utilities with respect to the proceedings involving Global NAPs and Bell Atlantic. These comments, however, do not address that question, because Ameritech believes it is a matter for Global NAPs, Bell Atlantic and the New Jersey Board to address in the first instance. Rather, these comments focus on one of the issues on which the New Jersey Arbitrator rendered a recommended decision — a critically important issue that must be addressed expeditiously in the appropriate forum, whatever forum the Commission determines that should be.

If the Commission does assert jurisdiction over this matter, the Commission should decline Global NAPs's invitation to rubber stamp the October 26, 1998, Arbitrator's award. Congress did not have such a ministerial function in mind when it charged the Commission with

assuming the responsibility of the State commission in the circumstances described in section 252(e)(5).[1/] Ameritech is confident, however, that the Commission will not assert jurisdiction over this matter merely to uncritically bless the Arbitrator's recommended decision, but instead will — if it takes the case — resolve the issues on the merits. Accordingly, Ameritech does not dwell on that point.

Ameritech's substantive comments are limited to a single issue that will confront the Commission if the Commission asserts jurisdiction:[2/] When a carrier "opts into" the interconnection, service and network element provisions of an approved interconnection agreement under section 252(i) of the 1996 Act, does the resulting agreement expire along with the underlying agreement, or does it take on the same duration as the underlying agreement — but not the same effective date or termination date — so that it outlives the underlying agreement?[3/]

This appears to Ameritech to be a clear-cut issue (though one that the Arbitrator apparently misunderstood), because a straightforward application of the language of section 252(i), as well as this Commission's previous interpretations of section 252(i), yield the same

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1/ Again, we offer no comment on whether those circumstances pertain here.

2/ No inference should be drawn from Ameritech's silence with respect to the two other issues that the Petition indicates the Arbitrator decided — except that Ameritech could not glean enough about those issues from the Petition to determine what comments might be appropriate.

3/ For example: If Global NAPs on June 1, 1999, opts into the interconnection, service, and network element provisions of an MFS/Bell Atlantic agreement that has an effective date of June 1, 1998, and a three-year term, does the resulting Global NAPs/Bell Atlantic agreement expire along with the underlying agreement on June 1, 2001, or does it survive until June 1, 2002?

answer as common sense and the law in the closely related area of most favored nations provisions in commercial contracts. The answer, of course, is that the requesting carrier's 252(i) agreement expires along with the agreement whose substantive provisions it adopts. Otherwise, outdated contract provisions would take on a life of their own and extend for many years beyond the time when the original contracting parties agreed they would terminate.

II. DISCUSSION

A. Section 252(i)

Ameritech's interconnection agreements — and the other interconnection agreements with which Ameritech is familiar — include an "Effective Date" and a provision that the agreement expires within a stated period (e.g., three years) after that date. The Effective Date and the associated (three-year) term are, of course, terms and conditions on which the interconnections, services and network elements covered by the contract are provided. Indeed, the date on which the agreement terminates is an integral part of the bargain. The other provisions in the agreement, prices in particular, hinge on the premise that the obligations set forth in the agreement end when the agreement ends. In the case of negotiated provisions for unbundled loops, for example, the bargain is that the incumbent will lease the loops to the competing carrier at the agreed price *until a specified time,* under the other terms and conditions set forth in the contract. The end-date and the price are intimately related; the incumbent is willing to agree to lease loops at the stated price until, say, June 1, 2001, but not beyond that, and the competing carrier, too, is bound to the agreement only for that period.

Section 252(i) embodies the common sense understanding that a carrier that opts into the interconnection, service and network element provisions of an approved agreement takes those provisions in accordance with the terms and conditions in the approved agreement:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

A carrier that exercises its rights under section 252(i) necessarily obtains, as "terms and conditions" of the interconnections, services and network elements in an approved agreement, the termination date in that agreement (or, equivalently, the Effective Date and the provision under which the agreement expires within a stated period after that date). Consequently, the resulting "252(i) agreement" will, as the result of a simple, straightforward, application of the language of section 252(i), expire on the same date as the underlying agreement.

There can be no plausible argument that the requesting carrier obtains the *duration* of the underlying contract but not its Effective Date. The reason is obvious: The Effective Date and the duration are inextricably linked components of the agreement to provide products and services at the prices (and terms and conditions) in the contract until, *and not beyond*, a certain date. If the prices in an agreement could be extended beyond the term of the agreement, they would, inevitably, become *non*-cost-based at some point. Congress did not intend for section 252(i) to be interpreted or applied in a way that would guarantee violations of the cost-based pricing standards in section 252(d)(2).

B. Common Sense

Not only do the words Congress used in section 252(i) make clear that the 252(i) agreement expires along with the underlying agreement, but sound policy considerations dictate the same result.[4/] If an incumbent carrier makes a bad deal in a five-year agreement with competing carrier X, section 252(i) levels the playing field by giving every other competing carrier the right to the same deal *so long as carrier X has it*. But once carrier X's deal expires, no other carrier is entitled to it. That is non-discrimination — a level playing field. In fact, this Commission has already recognized that the primary purpose of section 252(i) is to ensure against discrimination (e.g., *Local Competition Order* para. 1315), and that, to that end, a carrier that exercises its right to an interconnection, service or network element under section 252(i) necessarily takes all the terms and conditions that are "legitimately related to the purchase of the individual element being sought." (Id.) That, indisputably, includes the date when the agreement for that interconnection, service or network element expires.

Non-discrimination does *not* mean — and neither does section 252(i) — that carrier Y can come along four years after carrier X and opt into X's deal *for a new five-year term*. If it did, the incumbent would be stuck with its bad deal not just for the initial five-year period (during which the deal is available to all comers), but for an additional four years. Then, if during the term of carrier Y's 252(i) agreement other carriers are allowed to opt into *that* agreement for another, new, five-year term, the incumbent would be stuck forever with a bad deal that it should have had to live with for only five years. In short, what was agreed upon as a

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4/ Common sense would pick up the slack left by section 252(i) in the case of an agreement (if any such agreement exists) that has an explicit term of years, but no explicit effective date or termination date.

five-year contract commitment could be piggy-backed, or daisy-chained, into eternity.[5/] The injustice of such a scenario is underscored by the fact that if costs increase, the incumbent would never be able to increase its prices, while if costs decrease, the other carriers would have no obligation beyond the original term of their commitment.

Moreover, this Commission has already rejected any notion that Congress did intend such a result, when the Commission held that the provisions in an agreement that are subject to section 252(i) must remain available only "for a reasonable period of time. 47 C.F.R. § 51.809(c).[6/] As the Commission explained, "it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC" if the pricing or technical premises of the underlying agreement are no longer valid. *Local Competition Order* at para. 1319. Just as clearly, it would make no sense to permit a subsequent carrier to impose upon an incumbent LEC an agreement that will inevitably outlive the pricing or technical premises of the underlying agreement.

[5/] Nor could this result be avoided by a rule that prohibits 252(i)'ing into a 252(i) agreement, because such a rule would guarantee discrimination. Under the illustration in the text, for example, such a rule would mean that after X's contract expires, any carrier that had not already 252(i)'ed into X's contract would be deprived of the benefits that Y was continuing to enjoy.

[6/] Indeed, when the Commission sought comment on the time period for which an agreement must remain available for use by other requesting carriers (*id.* at para. 1298), the *longest* period that any commenter proposed was "as long as the agreement remains in operation" (*id.* at para. 1306). Sensibly, no commenter suggested that an agreement must remain available for use after it expires.

C. Case Law

The straightforward application of section 252(i) and common sense are in harmony with the case law, which holds that a party that exercises most favored nation rights of the sort accorded by section 252(i) cannot thereby obtain rights that outlive the source contract. In Eveleth Taconite Company v. Minnesota Power and Light Company, 221 N.W.2d 157 (Minn. 1974), for example, the Supreme Court of Minnesota interpreted an MFN clause in the context of electrical service contracts. The Eveleth Taconite Company ("Eveleth"), a mining business, negotiated two service contracts with a utility, one for three years that would expire in 1968 and the other for five years that would expire in 1970. Id. at 158. Both contracts contained an identical MFN provision. Id. at 158-59. While the two service contracts were in effect, the utility entered into similar contracts with other mining companies for a period of ten years. Id. at 159. The utility, pursuant to cancellation provisions in the first two contracts, gave notice to Eveleth that its electric power contracts would be canceled when its contracts expired. Id. Eveleth opposed the cancellation because the contracts afforded it a favorable price term. Id. at 159-60. Eveleth argued that the MFN clauses in its contracts entitled it to the same contract termination date as that included in the longest contract the utility had entered with the other mining companies. Id.

The Minnesota court rejected Eveleth's position, because it

> . . . would create a situation in which the contract could be indefinitely extended at plaintiff's election if defendant continued to enter contracts with other taconite companies. In other words, these contracts would be perpetual if defendant entered other agreements with taconite producers because plaintiff, if it so chose, could continually assume the longer term of those contracts. Id. at 161.

More recently, Arkansas Supreme Court addressed the same issue, and reached the same conclusion. Baker Car and Truck Rental, Inc. v. City of Little Rock, 925 S.W.2d 780 (Ark. 1996). Three car rental firms, Baker, Hertz and National, executed leases with a municipal airport commission that lasted for ten years with options thereafter. Id. at 781. The three contracts contained identical MFN clauses. Id. During the term of the leases, the commission signed another lease with a fourth car rental firm for a period of ten years with options. Id. As Baker's lease ended and before the other two expired, the commission proposed a new set of leases based upon a higher rental formula. Id. Baker, Hertz and National objected, arguing that the MFN clause allowed their lease terms to be extended to the termination date of the fourth lease. Id. at 781-82. The Arkansas court adopted the reasoning of the Minnesota court: "To accept Baker's argument that its lease should be 'automatically extended' requires one to rewrite the parties' agreement, which we refuse to do. Also, if we were to approve Baker's 'automatic extension' theory, these car-rental leases would be perpetual, since Baker would continually assume the longer lease term given any existing or new competitor." Id. at 783.

The same analysis applies here.

III. CONCLUSION

Ameritech offers no view at this stage on the question whether the Commission should grant Global NAPs's request that it preempt the jurisdiction of the New Jersey Board. If the Commission does assert jurisdiction, however, Ameritech urges the Commission to rule that

when a carrier "opts into" the interconnection, service and network element provisions of an aproved interconnection agreement under section 252(i) of the 1996 Act, the resulting agreement expires along with the underlying agreement.

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Respectfully Submitted,

GTB

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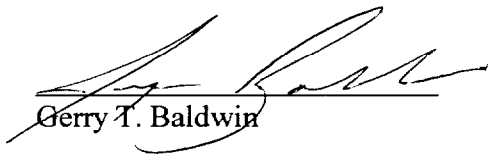
CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1999, I caused copies of the foregoing "Ameritech Comments" to be served on the persons on the attached Service List by the means indicated.



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